U.S. Department of Labor

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Issue Date: 18 October 2005

In the Matter of:
DARREN G. FIELDS, INDIVIDUALLY,

And Case Number: 2004-SCA-00005

W/D ENTERPRISE, INC.,
Respondents

Decision and Order

Ordering Debarment

This case was brought pursuant to the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. § 351 et seq, and the applicable regulations issued at 29 C.F.R. Parts 4, 6, and 18 and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges found at 29 CFR Part 18A.

Complainant, the Secretary of Labor, U.S. Department of Labor, seeks debarment of Respondents Darren Fields and W/D Enterprise, Inc. It alleges that Respondents systematically "nickeled and dimed" their employees by failing to pay the wage increases, holidays, vacation pay, and fringe benefits required under their contracts. Although Wage and Hour repeatedly explained the SCA's requirements, Respondents have come into compliance with the Act only after being caught in violation. It is further argued that the "… culpable conduct warrants debarment."

The Department of Labor was represented by Andrea Luby, Esquire and Mary Wright, Esquire, Office of the Solicitor, Kansas City, Missouri. The Respondents were represented by Katherine A. Worthington, Esquire, Leawood, Kansas. Preliminarily, Complainant filed a Motion for Summary Decision but in briefs and in Suggestions and in a telephone hearing, cross and counter allegations were tendered, and therefore material facts remained outstanding. In the telephone hearing, I ruled that Mr. Fields is a Responsible Party under the terms of the statute, and the case proceeded to hearing

The hearing was held in Wichita, Kansas on May 24, 2005. Susan Lang, an investigator for the Department of Labor testified as did Mr. Fields, Daniel Sosa, and Chris O'Brien, Esquire, bankruptcy attorney for Respondents. Complainant's exhibits 1 through 19 and Exhibit 21 were admitted into evidence. ("CX" 1- CX 19, CX 21). Respondent's Exhibits 101 through 119 and Exhibits 121 through 124 ("RX" 101 - RX, 119 and RX 121-RX 124), were also admitted. Part of the depositions of Susan Lauritsen and Thomas Knibb, CX 2 and CX 3, were read into the transcript. Post hearing both sides filed briefs and reply briefs.

Respondents admit that the violations occurred but argue that at most, the record violations "can only be characterized as 'petty' violations. They allege that the overall total of underpayments from the 2001-2003 investigations represents only four-tenths of one percent (0.4%) of the approximate total gross revenue of W/D's government contracts, excluding expenses ($16,000,000.00)." (Citing to Stipulations 10, 133 and 139; RX 113 at ¶ 7, RX 118,

RX 119 and RX 123 at p. 30 lines 1-4; and TR 134.)

The Department of Labor argues that the evidence shows that the SCA violations in this case were neither "petty" nor "innocent." Rather, Respondents have underpaid their employees by failing to pay wage increases, fringe benefits, vacations, and holidays worth more than $70,000.00. [Stipulations 11 and 133].

Law and Regulations

This case arises under SCA, as amended, 41 U.S.C. §351 et seq., and implementing regulations issued thereunder at 29 C.F.R. Parts 4, 6, and 18. The purpose of the SCA is to punish those who have received federal monies via a service contract and have:

1. Failed to pay the minimum wages for each particular position listed in the Dictionary of Occupational Titles, a government compiled list of positions and the preliminary wages for the positions;
2. Failed to award minimum fringe benefits to employees;
3. Failed to maintain adequate records.

Pub. L. 87-581, Title 1, Section 101-107; 72 Stat. 357 (Aug. 13, 1962), as amended by Pub. L. 91-54, Section 1; 83 Stat. 96 (Aug. 9, 1969). The SCA establishes standards for hours of work and overtime pay of laborers and mechanics employed on work performed under contract for, or with the financial aid of, the United States, for any territory and the District of Columbia. The SCA mandates a standard workday of 8 hours, a standard workweek of 40 hours and requires payment of wages at the rate of 1« times the basic rate for all hours worked in excess of 8 hours per day or 40 hours per week.

Under the SCA, debarment is presumed once violations have been established unless the respondent can prove the existence of "unusual circumstances" that warrant relief from debarment. 29 C.F.R. § 4.188(a) and (b); ***Hugo Reforestation, Inc***., ARB Case No. 99-003, 2001 WL 487727 (DOL Adm. Rev. Bd., Apr. 30, 2001). Debarment shall be for three years, without modification. 41 U.S.C. § 354(a).

However, the Secretary's discretion to relieve a violator from the sanction of debarment is limited, and a contractor seeking such an exemption "must, therefore, run a narrow gauntlet." 29 C.F.R. § 4.188(b)(1); ***Sharipoff, dba BSR Co***., 1988-SCA-32, slip op. at p. 6 (Sec'y Sept. 20, 1991). In order to prove unusual circumstances, a contractor must satisfy all prongs of a three-part test.

1. The contractor must establish that its violations were not willful, deliberate, or of an aggravated nature, and that the violations were not the result of culpable conduct. 29 C.F.R. § 4.188(b)(3)(i). [Part I].
2. The contractor must show that it has a good compliance history, cooperated in the investigation, repaid the moneys due, and has made sufficient assurances of future compliance. 29 C.F.R. § 4.188(b)(3)(ii). [Part II].
3. Numerous factors bearing on the Contractor's good faith must be considered before relief from debarment will be granted, e.g., whether the contractor has previously been investigated for SCA violations, whether the contractor has committed recordkeeping violations which impeded the Department's investigation, and whether determination of liability under the SCA was dependent upon resolution of bona fide legal issues of doubtful certainty, and the contractor's efforts to ensure compliance. Id. [Part III].

The second and third parts need not be considered if a contractor does not satisfy the first prong. ***Hugo Reforestation, Inc***, *supra*.

Under Part I of the unusual circumstances test, "culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records)." 29 C.F.R. § 1.188(b)(3)(i). Ignorance of the law has constituted "unusual circumstances" in limited circumstances.

Stipulated Findings of Fact

The parties stipulated that Respondent bears the burden of proof. Tr.9. The parties have also agreed to 151 findings of fact set forth below and I accept that the record substantiates the following:

1. W/D Enterprises began in August 1993 as a general partnership. W/D Enterprises was owned by Darren G. Fields ("Fields") as a 2/3 owner and by Wayne Bell as a 1/3 owner. Tr. 29-30.
2. Fields and Bell incorporated W/D Enterprises on April 18, 1995 as W/D Enterprise, Inc. Id.
3. Respondent Darren G. Fields ("Fields") was responsible for the employment practices and management policies of W/D Enterprise, Inc. during the period from 1998 to the present. Id. 29-31.
4. Mr. Fields had complete control over the employment practices of W/D Enterprises and W/D Enterprise, Inc.
5. Mr. Fields was President of W/D Enterprise, Inc.
6. W/D Enterprise, Inc. had a principal place of business located at 217 South Pattie in Wichita, Kansas.
7. On January 15, 2002, the corporate charter lapsed for W/D Enterprise, Inc., and W/D Enterprise, Inc. forfeited its corporate status.
8. The corporate charter was reinstated on February 27, 2004.
9. Mr. Fields signed contracts with the federal government as either "Darren G. Fields, President" or "Darren G. Fields."

Investigations in 2001 and 2002

10. Wage and Hour investigated 5 contracts in 2001 and 2002, and concluded that a total of 86 employees of W/D Enterprise, Inc. had been underpaid a total of $55,695.75 in wages, welfare and fringe benefits and holidays.
11. The $55,695.75 in underpayments calculated during Wage and Hour's 2001 and 2002 investigations equals 4% of the total value ($1,388,959.53) of all five government contracts investigated.

i. Investigation of Mail Haul Contract in 2001

12. In 2001, the Wage and Hour Division in Kansas City, Kansas investigated contract number 66436, under which W/D Enterprise, Inc. ran a mail haul route from July 1, 2000 to June 30, 2001.
13. W/D Enterprise, Inc. paid its light vehicle driver employees $10.00 per hour, which was sufficient under the original wage determination (Rev. 26) rate of $9.84 per hour base wages. However, the employer continued to pay this amount after being advised by the U.S. Postal Service of the increased rate of $10.45 per hour due under a revised wage determination (Rev. 29).

14. The wage determination (Rev. 29) required $1.92 per hour in fringes for health and welfare. W/D Enterprise, Inc. failed to pay any health and welfare, either in cash or a third party benefit plan.
15. All employees were owed $1.92 per hour in fringe benefit payments for all hours worked up to forty per week.
16. Seven employees were owed $5,264.27 in unpaid fringe benefits.
17. The amount of the underpayment on the Mail Haul Contract in 2001 was the equivalent of 18.4% of the overall contract value of $28,669.53.
18. The Mail Haul Contract 2001 was W/D Enterprise, Inc.'s first, and only, Mail Haul Contract.
19. W/D Enterprise, Inc. opted out of the Mail Haul Contract after one year of the three-year contract.
20. During the investigation, the Wage and Hour Investigator Kathie Rogers ("WHI Rogers") informed W/D Enterprise, Inc. that the correct labor category for the contract was "Light Truck Driver."
21. At the conclusion of the investigation in March 2001, WHI Rogers discussed the provisions of the SCA with Mr. Fields. She told Fields that he had to pay the Rev 29 rate, had to pay the wage determination of $10.45 to all drivers, had to pay the health and welfare rate of $1.92 per hour for all hours up to forty per week, and had to segregate the base and fringe wages on his payroll records.
22. Mr. Fields agreed to comply in the future and to pay the back wages by March 31, 2001.

ii. Investigation of Janitorial Services Contract for U.S. Courthouse in Wichita, Kansas

23. In May 1999, WHI Rogers met with Mr. Fields regarding contract number GSO6P99GXC0005, under which W/D Enterprise, Inc. was to provide janitorial and maintenance services at the U.S. Courthouse in Wichita, Kansas from May 1, 1999 through May 1, 2002.
24. WHI Rogers explained all of the provisions of the SCA, and also explained that the Department of Labor checked each contractor on that particular contract within the first two years.
25. WHI Rogers provided Mr. Fields with copies of the SCA, Part 4 of the SCA Regulations at 29 C.F.R. Section 4, poster, and non-tech bulletins on SCA compliance.
26. Wage and Hour began its investigation of W/D and its contract number GSO6P99GXC0005, "Janitorial Services Contract", in August 2001. During the investigation, Mr. Fields stated that he had seven current SCA contracts.
27. Wage and Hour concluded that W/D Enterprise, Inc. paid the proper base wage of $7.07 for janitors and $19.28 for HRAC mechanics at the beginning of the contract. However, when the base wages increased on May 1, 2001, to $7.32 per hour for janitors and $19.95 per hour for HRAC mechanics, W/D Enterprise, Inc. failed to increase pay accordingly. Seventeen employees were owed $1,257.29 in base wage back wages for the period of May 2001 through September 14, 2001.
28. When the wage determination fringe benefit rate increased to $1.63 per hour from $1.39 per hour on May 1, 2000, W/D Enterprise, Inc. failed to increase pay accordingly.
29. When the rate increased to $1.92 per hour on May 1, 2001, W/D Enterprise, Inc.

failed to increase pay accordingly.
30. W/D Enterprise, Inc. stated that it began paying fringe benefits of $1.92 per hour on September 14, 2001, after Wage and Hour had informed the company of the requirement to pay that rate. However, a follow up check by WHI Rogers showed that W/D Enterprise, Inc. did not actually increase its fringe benefit payments in September 2001. A second and then third request had to be made to get the proper health and welfare fringes paid.
31. On October 26, 2001, an additional computation was made to bring the back wage computation up to date. Thirty-five employees were due $3,511.00 in these fringe benefit adjustments.
32. Eleven paid holidays were due under the wage decision. All holidays were paid in 1999. However, in 2000, W/D Enterprise, Inc. failed to pay employees for Martin Luther King Day or Good Friday. In 2001, W/D Enterprise, Inc. failed to pay employees for Good Friday. In all, 15 employees were due holiday fringe benefits of $1,377.12.
33. Six employees were due back wages of $3,545.50 for vacation fringe benefits.
34. Three employees regularly worked at the courthouse but were not on the courthouse SCA payroll. They were owed back wages of $9,127.26.
35. W/D Enterprise, Inc. underpaid 33 employees on the U.S. Courthouse Contract in the amount of $18,818.17.
36. The amount of the underpayment on the Janitorial Services Contract was the equivalent of 3.7% of the overall contract value of $503,712.00.
37. During the investigation, Wage and Hour claimed that Mr. Charlie Wilson was entitled to overtime. At the conclusion of the investigation, W/D Enterprise, Inc. agreed to pay Mr. Wilson the requested overtime.
38. W/D Enterprise, Inc. retained attorney Chris O'Brien to represent it. Mr. O'Brien was not available to meet to discuss back wage payments until January 8, 2002.
39. At the meeting on January 8, 2002, Mr. O'Brien and Mr. Fields agreed that all back wages in the contract would be paid in full by February 28, 2002, except for Charlie Wilson, who would be paid by March 31, 2002.
40. Wilson did not receive his back wages by March 31, 2002. On April 22, 2002, W/D Enterprise, Inc. still owed him owed $2,000.
41. Because W/D Enterprise, Inc. had failed to pay $2,000 owed to Wilson on a previous investigation, and claimed a financial inability to pay back wages, the $2,000 owed to Wilson was withheld from other contracts of W/D Enterprise, Inc.
42. W/D hired Eastland International Resources, Inc. of Midland, Texas to pay W/D's payroll.
43. According to Wage and Hour Investigator Rogers ("WHI Rogers"), "employer Fields stated that he had not intentionally made any underpayments, that all the errors were caused by mistakes, misunderstandings and confusion."

iii. Investigation of Topeka Federal Buildings

44. In September 2000, W/D Enterprise, Inc. began performing janitorial services at a federal building and a Social Security Administration building in Topeka, Kansas, pursuant to contract number GS06POOGXC0029.
45. From September 2000 to September 2001, W/D Enterprise, Inc. paid $1.63 per hour for health and welfare fringe benefits rather than the required 1.92 per hour.

46. From September 2001 through November 10, 2001, W/D Enterprise, Inc. paid $1.63 per hour rather than the required $2.02 per hour for health and welfare fringe benefits.
47. W/D Enterprise, Inc. also paid for fewer vacation days than required. Six employees were due vacation pay.
48. Following an investigation by the Wage and Hour Division in 2001, W/D Enterprise, Inc. paid $12,147.50 to 19 employees for the above-referenced SCA violations.
49. W/D Enterprise, Inc. repaid all of the back wages due to its employees under the Topeka Federal Buildings Contract.
50. The total amount of the underpayment on this contract was the equivalent of 3% of the overall contract value of $414,192.00.

iv. Holloman Air Force Base

51. The Holloman Air Force Base contract, F29651 99 C 0001, was "to sort and deliver mail on the base (not a mail haul contract)."
52. The contract called for a base wage of $7.85 during 1998 and 1999, but W/D Enterprise paid only $7.24 per hour.
53. When the prevailing wage was increased to $8.12 per hour, W/D Enterprise, Inc. continued to pay only $7.24 per hour.
54. These violations resulted in underpayments of $4,541.83 to 4 employees.
55. W/D Enterprise, Inc. also failed to increase fringe benefits of employees when the amount required for fringe benefits increased, failed to pay vacations, and failed to pay fringe benefits on vacation and holiday hours. This resulted in underpayments of $3,992.69 for health and welfare, vacation, and holidays.
56. Following an investigation by the Wage and Hour Division in 2001, W/D Enterprise, Inc. paid $8,534.52 to four employees for the above-referenced SCA violations.
57. W/D Enterprise, Inc. repaid all of the back wages due to its employees on the Holloman Air Force Base contract.
58. The amount of the underpayment on this contract was the equivalent of 8% of the overall contract value of $107,430.00.

v. U.S. Army Reserve, 89th Regional Support Command

59. Contract number DAKF29-99-P-7304 was awarded to W/D Enterprise, Inc. on February 27, 1999.
60. Although the contract states that it was awarded to W D Enterprise, Inc., the correct party to the contract was W/D Enterprise, Inc.
61. Contract number DAKF29-99-P-7304 the "U.S. Army Reserve, 89th Regional Support Command Contract" was to "provide custodial services at US Army Reserve Building / 89th Regional Support Command Reserve Unit on McConnell Air Force Base in Wichita, Kansas."
62. Contract number DAKF29-99-P-7304 ran from September 1, 1999 through August 31, 2002.
63. Contract number DAKF29-99-P-7304 was renewed on September 1, 2002.
64. The renewed contract ran through April 30, 2003.
65. W/D Enterprise, Inc. paid the base wage of $7.07 per hour properly at the beginning of the contract in 1999. However, when the base wage was increased to $7.32 per hour on September 1, 2000, W/D Enterprise, Inc. failed to implement the increase. Fourteen

employees were owed $1,416.65. W/D Enterprise, Inc. paid the correct prevailing wage ($8.36 per hour) to employees beginning on September 1, 2001).
66. When the fringe benefit amount increased on September 1, 2000 to $1.92 per hour, W/D Enterprise, Inc. did not increase its contribution. Seventeen employees were due $2,212.89 for fringe benefits between September 2000 and September 2001.
67. The Wage Determination called for 11 paid holidays. W/D Enterprise, Inc. failed to pay for Good Friday or a substitute holiday for 2000 or 2001.
68. Eight employees were owed $233.24 and $241.96 for the two holidays.
69. The Wage Determination also called for 2 weeks paid vacation after one year of service. Seven employees were due vacation for 2000 totaling $2,069.60.
70. Five employees were due vacation for 2001 totaling $1,541.20.
71. Twenty employees were owed $1,995.92 for health and welfare fringe benefits for vacations and holidays.
72. Following an investigation by the Wage and Hour Division in 2001, W/D Enterprise, Inc. paid a total of $10,931.29 to 23 employees under this contract.
73. W/D Enterprise, Inc. repaid all of the back wages due to its employees on the 2001 U.S. Army Reserve contract.
74. The amount of the underpayment on the 2001 U.S. Army Reserve contract was the equivalent of 3.3% of the overall contract value of $334,956.00.
75. On April 23, 2002, Wage and Hour held a final conference with Mr. Fields regarding the Topeka Federal Buildings Contract, the Holloman Air Force Base Contract, and 2001 U.S. Army Reserve Contract.
76. Because W/D Enterprise, Inc. claimed a financial inability to pay back wages, the $31,392.20 due on the other three contracts, were withheld from other contracts of W/D Enterprise, Inc.
77. During the final conference, Mr. Fields was provided with copies of WH 56's, as well as Parts 4 and 6 of the Service Contract Act Regulations, 29 C.F.R. Sections 4 and 6.

The 2003 Investigations

1. U.S. Army Reserve, 89th Regional Support Command

78. Beginning on January 7, 2003, Wage and Hour conducted another investigation of contract DAKF29-99-P-7304, under which W/D Enterprise, Inc. was providing janitorial services at the U.S. Army Reserve, 89th Regional Support Command in Wichita, Kansas.
79. A prior investigation of this same contract revealed SCA violations totaling $10,931.29 through September 9, 2001.
80. The new investigation covered the period from September 1, 2001 through December 14, 2002.
81. Contract number DAKF29-99-P-7304 incorporates wage determination 1994-2215-Revision 15, dated May 31, 2001.
82. Wage Determination 1994-2215-Revision 15, dated May 31, 2001, required the payment of $8.36 per hour, $2.02 in health and welfare, 10 paid holidays, and one week vacation after one year of service.
83. The follow-up investigation revealed that W/D Enterprise, Inc. failed to pay fringe benefits totaling $713.06 to eight employees under contract number DAKF29-99-P-7304.
84. After this second investigation, W/D Enterprise, Inc. paid the $713.06 due to the service employees under the contract.

85. W/D Enterprise, Inc. repaid all of the back wages owed to its employees from this investigation.
86. The amount of the underpayment on the 2003 U.S. Army Reserve Contract was the equivalent of less than 1% of the overall contract value of $148,750.00.

2. The Gulf War Hotline Contract

87. On November 10, 2000, the government of the United States of America awarded W/D Enterprise, Inc. contract number V255P(657)0374.
88. The contract was for the period of December 1, 2000 through November 30, 2001, and was renewed from December 1, 2001 through November 30, 2002.
89. The contract was subject to the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, and the regulations issued thereunder.
90. The contract was for the provision of telephone operators for the Veteran's Administration "Gulf War" Hotline at the VA Medical Center in St. Louis, Missouri.
91. On November 25, 2002, Wage and Hour began investigating this contract.
92. The investigation period ran from December 1, 2000 to November 30, 2002.
93. The contract incorporated Wage Determination 1994-2309, Revision No. 20, dated September 15, 2000.
94. Wage Determination 1994-2309, Revision No. 20, dated September 15, 2000, required the payment of prevailing wages and fringe benefits, including 10 paid holidays and fringe benefits for holidays.
95. W/D Enterprise, Inc. did not pay holidays or fringe benefits for holidays to 13 switchboard operator-receptionists from December 1, 2001 through November 30, 2002.
96. The amount due for holidays and fringe benefits for holidays under the contract totaled $9,885.36.
97. During a telephone conversation held with the Wage and Hour Division, W/D Enterprise, Inc. agreed to pay $9,885.36 for wages and fringe benefits under the contract on or before December 31, 2002.
98. W/D Enterprise, Inc. failed to pay $9,885.36 for wages and fringe benefits under the contract on or before December 31, 2002.
99. After being notified that the Wage and Hour Division had initiated cross-withholding on another government contract, W/D Enterprise, Inc. paid $9,885.36 for wages and fringe benefits under the contract.
100. W/D Enterprise, Inc. repaid all back wages owed on the Gulf War Hotline Contract.
101. The amount of the underpayment on the Gulf War Hotline Contract was the equivalent of 3.9% of the overall contract value of $256,471.40.

3. The Grounds Maintenance Contract

102. On January 27, 2002, the government of the United States of America awarded W/D Enterprise, Inc. contract number DAKF29-02-P-0289.
103. The contract states that it was awarded to "W.D. Enterprise Mr. Fields." When the contract was awarded, the corporate charter of W/D Enterprise, Inc. had lapsed.
104. On May 1, 2003, Wage and Hour began investigating this contract for the investigation period from January 1, 2002 through May 1, 2003.
105. Contract number DAKF29-02-P-0289 was for grounds maintenance at the U.S. Army Reserve in St. Louis, Missouri.

106. Contract number DAKF29-02-P-0289 was for the period of January 23, 2002 through December 31, 2002, and was renewed in April of 2003 through February 28, 2004.
107. Contract number DAKF29-02-P-0289 was subject to the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, and the regulations issued thereunder.
108. Contract number DAKF29-02-P-0289 incorporated Wage Determination No. 1994-2310, Revision 20, dated May 23, 2001.
109. Wage Determination No. 1994-2310, Revision 20, dated May 23, 2001, required the payment of wages of $9.34 per hour.
110. The Wage Determination also required the payment of $2.56 per hour in health and welfare, plus ten paid holidays.
111. The work to be performed for the first year of contract no. DAKF29-02-P-0289 was subcontracted to Three Men and an Old Lady.
112. Three Men and an Old Lady was a sole proprietorship of Sue Lauritsen. The company was small, employing only five part-time employees.
113. Mr. Fields and W/D Enterprise, Inc. never provided a complete copy of contract no. DAKF29-02-P-0289 to Three Men and an Old Lady or Sue Lauritsen.
114. W/D Enterprise, Inc. provided an incomplete copy of the contract to Ms. Lauritsen. The copy said nothing about the obligation to pay fringe benefits or holidays.
115. Lauritsen first learned of the requirements of the Service Contract Act when she was contacted by an employee of the U.S. Department of Labor.
116. Following an investigation of Three Men and an Old Lady's failure to pay for the Memorial Day Holiday and failure to provide compensation for health and welfare pay, Wage and Hour withheld $3,372.81 under contract no. DAKF29-02-P-0289 pending resolution of this action.
117. W/D Enterprise, Inc.'s contract with Three Men and an Old Lady stated that Three Men and an Old Lady would maintain Part A of the grounds each week, and Part B every two weeks.
118. W/D Enterprise, Inc. admits that the $3,372.81 withheld by Wage and Hour should be distributed to the employees of Three Men and an Old Lady in the following amounts:

Lekeyth M. Gillard	$1,019.93
Nordric Tankins	$1,173.17
Jeffrey A. Williams	$1,179.71

119. The amount of the underpayment to employees of Three Men and an Old Lady on the Grounds Maintenance Contract was the equivalent of 2.3% of the overall contract value of $148,750.00.
120. The renewal of DAKF29-02-P-0289 incorporated Wage Determination No. 1994-2310, Revision 23.
121. Wage Determination 1994-2310, Revision 23, required the payment of $10.27 per hour, plus $2.15 per hour in health and welfare, plus ten days paid holidays.
122. The work to be performed under the renewal of contract no. DAKF29-02-P-0289 was subcontracted to Knibb's Outdoor, a company with only two employees.
123. W/D Enterprise, Inc. never provided a complete copy of contract number DAKF29-02-P-0289 to Knibb's Outdoor.
124. Prior to Wage and Hour's investigation, W/D Enterprise, Inc. and Mr. Fields failed

to provide any documents to Tom Knibb regarding his obligations under the Service Contract Act.
125. Tom Knibb first learned of his obligations under the Service Contract Act when he received a telephone call from Wage and Hour Investigator Sonia Granados.
126. After this telephone call, Mr. Knibb received written notice from W/D Enterprise of the mandatory wage determination.
127. Wage and Hour computed $515.39 in unpaid fringe benefits and holidays for employees of Knibb's Outdoor.
128. After the United States Department of Labor notified W/D Enterprise, Inc. of the amount due under contract no. DAKF29-02-P-0289, W/D Enterprise, Inc. paid $515.39 for holidays and fringe benefits for holidays due under the contract.
129. W/D Enterprise, Inc. underpaid two employees of Knibb's Outdoor on the Grounds Maintenance Contract in the amount of $515.39, but repaid that amount to them after the Wage and Hour investigation.
130. The amount of the underpayment to employees of Knibb's Outdoor on the Grounds Maintenance Contract was the equivalent of .3% of the overall contract value of $148,750.00.
131. Since the Wage and Hour investigation, W/D Enterprise, Inc. increased the amount paid to Knibb's Outdoor pursuant to the Grounds Maintenance Contract to cover holiday pay to its employees. On May 19, 2003, Tom Knibb, the owner of Knibb's Outdoor, signed a letter stating "I was notified as of May 19, 2003 of the mandatory wage determination." The May 19, 2003 letter identifies the mandatory base wage rate as $10.27 per hour, and the fringe rate as $2.15 per hour.
132. Since Wage and Hour's investigation, Knibb's Outdoor did not pay holidays to its employees working under the subcontract with W/D Enterprise, Inc.
133. Wage and Hour's investigations of the three contracts in 2003 concluded that a total of 26 employees were underpaid a total of $14,486.62 in wages, welfare, fringe benefits and holidays.
134. The $14,486.62 in underpayments calculated during Wage and Hour's 2003 investigations equals 2.5% of the total value ($572,600.40) of all three contracts investigated by Wage and Hour.
135. All of the contracts described in facts 1-134 were subject to the provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, and the regulations issued thereunder.

Financial Status of W/D Enterprise, Inc.

136. W/D Enterprise, Inc. currently employs over 440 employees.
137. Contracts with the United States government, including various agencies, comprise more than 90% of W/D's business.
138. Since W/D began servicing United States governmental projects in October of 1998, W/D has serviced approximately 50-60 contracts.
139. Since October, 1998, the total value of all of W/D's 50-60 governmental contracts has exceeded $16,000,000.00.

W/D Enterprise, Inc. as a Section 8(a) Business

140. W/D Enterprise, Inc. is a Small Business Administration ("SBA") certified, Section

8(a), small disadvantaged business.
141. Certified Public Accountant, Dan Sosa, began working with W/D in the summer of 2004.
142. The goal of the SBA's Section 8(a) Program is to provide business development opportunities for Section 8(a) certified companies by performing on contracts with the federal government. The economic opportunities are expected to assist in overcoming prevalent economic disadvantage.
143. A company applying for certification into SBA's Section 8(a) Program must demonstrate the existence of social and economic disadvantage for the company and its principal.
144.The SBA's training programs available to Section 8(a) companies offer limited technical assistance, and the funding for the training programs has dropped significantly over the last 8 years.
145.A Section 8(a) Company is given preferential treatment in being awarded federal government contracts.
146. Darren Fields performed multiple functions within W/D, including areas where he lacks formal training or experience.
147. W/D is an award winning Midwest SBA 8(a) Company.
148. The Defense Contract Audit Agency performed a pre-award audit of W/D's accounting system and related policies and procedures, which resulted in an "Acceptable" rating.

W/D Enterprise, Inc.'s Bankruptcy

149. W/D filed for Chapter 11 bankruptcy on February 2, 2004, and is currently in the process of reorganizing.

W/D Enterprise, Inc.'s New Procedures

150. W/D has adopted an SCA Compliance Policy, which provides for annual contract review as follows:

a. "Call Contracting Officer or Contract Administrator to check status of any revised Wage Determination"

b. "Petition government (client) for Base Wage and/or Health & Welfare fringe benefits increase"

c. "Adjust all employees pay to reflect all applicable Base Wage and/or Health & Welfare increases."

d. "Check all employee records to confirm accuracy in Holiday and Vacation."

151. In the summer of 2004, W/D engaged the services of accountant Dan Sosa.

Discussion of Record Evidence

Both parties submitted proposed findings of fact and conclusions of law. In Department of Labor Proposed Findings of Fact, it is alleged that since 2001, the Wage and Hour Division has investigated seven separate contracts of W/D Enterprise, Inc., and the examination of each contract revealed significant violations of the SCA. In total, Respondent s underpaid 112 employees by $70,182.37. [Citing to Stipulations No. 10 and 133]. The record substantiates that investigations occurred on three separate occasions since 2001:

a. The First Investigation. The First Investigation involved Contract number HCR 66436 ("the Mail Haul Contract") [Exh. 10]. This investigation concluded in March 2001.

[Stipulation 21].

b. The Second Investigation. The Second Investigation began in August 2001 [Stipulation No. 26], and involved four additional contracts: Contract Number GSO6P99GXC0005 ("the Janitorial Services Contract") [Exhibit 11]; Contract Number GSO6P00GXC0029 ("the Topeka Federal Buildings Contract") [Exhibit 12]; Contract Number F29651 99 C 0001 ("the Holloman Air Force Base Contract") [Exhibit 13]; and Contract Number DAKF29-99-P-7304 ("the U.S. Army Reserve Contract") [Exhibit 14].

c. The Third Investigation. The Third Investigation began on November 30, 2002, and involved the U.S. Army Reserve Contract ("the 2003 U.S. Army Reserve Contract") and two additional contracts: Contract Number V255P(657)0374 ("the Gulf War Hotline Contract") [Exhibit 15] and Contract Number DAKF29-02-P-0289 ("the Grounds Maintenance Contract") [Exhibit 16].

After an independent review of the evidence, I find that the above findings accurately reflect the record in this case.

Respondents admit that at times they have been out of compliance, but they allege that they remedied the problems through an initiation of an annual SCA compliance policy to confirm whether a wage determination increase has occurred. According to Mr. Fields, "If there has been an increase we'll petition for the increase, pass that increase along to the employees, and make sure that we're current on all holiday and vacation pay." Tr. 51-52. RX 116. The policy is currently in place, and Mr. Sosa was retained to administer it. TR 52, 112.

According to Respondents, and Mr. Fields testimony, as soon as W/D Enterprise found out that an underpayment to employees had been made, "[W]e would just find out how much we owed and pay the employees immediately." TR 51.

On cross examination, Mr. Fields admitted that he knew that he was required to pay the prevailing wages listed in the wage determination. TR. 60. However, Respondent maintains that at first, he was unaware that contracts also came with wage determinations attached. Id. "I just thought that they just renew them and we had to sign off that we were going to go into the next year. They would cite them but I didn't know that they changed." He admitted further that he failed to read the wage determinations attached to the option year contracts. Id. 60-61. However, later in testimony, he admitted that by April, 2001, he was aware that he could petition to modify the contracts. Id 71. He also was sued by DOL to effectuate payment of employees from other SCA contracts. Id. 112.

The record shows that Respondent Company entered business in 1998 and by 2001 already had a significant number of federal, government contracts. Id. 60.

Mr. Fields testified that W/D Enterprise had to opt out of the Mail Haul Contract because of confusion with the rates "got me into that SCA situation, and we just didn't think it was something that we wanted to continue." Tr. 35. However, Mr. Fields maintains that he was confused whether his employees were considered "rural route drivers", however, the contract, CX 10 does not mention them by category. Id. 69-70. Under contract language, the employees were "light vehicle drivers", but admittedly, although the contract required the payment of fringe benefits, none were paid. Id. Although directed to the terms in the contract by counsel, Mr. Fields did not directly address this issue on cross examination. Id. However, he stipulated to the error, Stipulation 21.

Mr. Fields alleged that he understood that he got the contracts originally as a fixed priced contract to provide service for a "particular amount for the multi years, and we weren't aware that that wage could change annually based on the wage determination and that we could petition

to have those increases and then we would also pass on those increases to the employees; we just weren't aware of that." Tr. 42-43. He alleges that he learned in 2001 that he could make a petition to amend the amounts. Id. 43.

The record shows that employees were to be paid vacation and holidays, Mr. Fields admittedly missed approximately eleven (11) holidays. "I think that this is like when Martin Luther King first came on board or Good Friday. We had some confusion between this one and what the other contracts were asking us to pay so I think we might have skipped a holiday or something." Id. 82. He blamed Sheila Jackson for failing to keep anniversary dates of service for failure to pay vacation pay properly. Id. 83.

He also alleged that the errors in the janitorial contract was "just a mistake." Id. 36. The company repaid $18,818.17 for the errors in the janitorial contract, including payments to Charlie Wilson. He alleges that "we were supposed to provide some wage increases to the employees which would annually come out as new wage determination to the contract, and we weren't aware of those increases." Id. 37-38. Mr. Wilson was a route supervisor on the janitorial contract and he also supervised five other commercial contracts "so he was a floating supervisor on a daily basis." He was considered a salaried employee, because he worked on multiple contracts. Id. 38, 85. However, on cross examination, he admitted that Mr. Wilson and two other employees weren't on the SCA payroll records. TR. 85.

According to Mr. Fields initially, Mr. Wilson was paid the full amount of underpayment. Id. 38-39. However, Mr. Fields admitted that Mr. Wilson never received the money. Id. 38-40. He blamed Sheila Jackson for failing to get the money to Mr. Wilson. Id. 86-87. He also blamed Sheila Jackson for falsely telling him that she had raised employee fringe benefits in September, 2001. TR 88-90.

He also admitted that he failed to petition to modify the contract. He was placed on notice he could petition. TR 79, CX 18. "We started the paperwork process and, you know, I don't know what happened. We never got it submitted. I don't think that, if I remember right I thought Peggy said, 'Well Darren you need to turn in payroll records, or this and that.' We started the process but we never brought it to fruition for some reason." Id. 76. Although DOL requested employee records, they were never provided. Id. 80.

Respondents received modified contracts that explicitly incorporated revised wage determinations. The Modification of the Topeka Federal Buildings Contract was faxed to Field's assistant, Sheila Jackson. CX. 12 at 2, TR. 92.With respect to the Topeka Federal Building $12,417.50.was owing and repaid by check to the employees. TR. 40, RX 118, CX 12. The purported reason for the underpayment on that contract was from wage increases "due to determinations". Id. Mr. Fields attributes it to a "mistake" rather than "on purpose". Tr. 41, CX 118. He also blames Sheila Jackson for failing to apprise him of a modified Wage Determination under this contract. Tr. 90-93.

The Modification for the Holloman Air Force Base Contract also incorporated a revised Wage Determination, which was sent to Fields. TR. 95. The Modification for Option Year 3 extended the term of the contract from October 1, 2001 through March 1, 2002. CX 13, 45; CX 6, 14. The Modification provided as follows: "Wage Determination No. 94-2511 (Rev. 19) dated 5/31/2001, is hereby incorporated into the subject contract." [Id.]. The referenced Wage Determination was attached to the Modification. CX 13, 45; TR. 94. $8,534.52 was owed on underpayment on the Holloman Air Force Base Contract, and repaid by check to the employees, again, not "on purpose". TR 41, TR 93-95, RX 118, CX 13.

$10,931.29 were owed on the US Army Reserve Contract in 2001, again repaid by check,

and not "on purpose". Tr. 42, CX 118. $713.06 was owed under the 2003 Army Reserve Contract and that amount was also paid. Id. 43. He attributed the underpayments as a mistake by his office manager, Sheila Jackson. Id. 97.[1] He also alleged that there were mixed or opposing instructions from the DOL investigators. Id.

$9,885.36.was owed on the Gulf War Hotline contract, CX 21; that amount was paid to the employees in question. TR. 44. The amount in dispute was for VA holiday pay. "[W}e took that as an action that we should not pay holidays because we never heard an agency say that before." Id. 45.

$3,372.81 to one subcontractor and $515.39 to another on the Grounds Maintenance contract were owed. Again, it is alleged that the error was a mistake. "To Knibb's Outdoor we paid the $515.39, and to Three Men and an Old Lady we told the contracting officer to pull it out of our next contract payment, and to our knowledge it was paid." Id. 46.

> Q And what were the reasons for the underpayment on that contract?
>
> A Just a lack, those were the first contract I had, grounds contracting, the first subcontractor I had. Since these were seasonal, part-time employees, they worked two or three hours a week, I didn't know that they got vacation and holiday pay. My understanding of the wage determination as far as holidays you had to work the day before and after a holiday to get paid for it. The facilities weren't open for mowing on holidays so we just didn't think that they got holiday pay. And as far as vacation pay, someone who accrues three, twelve hours a month for seven months we didn't think that they got vacation pay.

Id. Mr. Fields alleges that he verbally told Three Men and an Old Lady, the subcontractor on the contract, that there was a minimum mandatory wage determination, "a base, a minimum base wage for the grounds maintenance workers and also a minimum fringe payment."

> Q And did you give a total amount or did you give two separate amounts?
>
> A We gave them two separate amounts and a total amount, not to be paid less than.
>
> Q What did W/D Enterprise do to ensure that Three Men and an Old Lady was paying the wages correctly?
>
> A We just told them exactly what we wanted to, they based their bid off of that, and we just took it as a, on their word that they would pay the employees that.
>
> Q Did W/D Enterprise ever see any of the payroll records from Three Men and an Old Lady?
>
> A No, they just would invoice one lump sum for their services on a monthly basis.
>
> Q Would they invoice Three Men and an Old Lady for the actual work done?
>
> A Just, you know, per the contract line items just how much they charged us per mowing.

Id. 47-48.

The Respondents directed me to the fact that this contract was amended on two separate

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[1] (Mr. Fields) A Correct. Now, Andrea [Luby], now, if I pointed that it's not my responsibility as far as implementing this, it was my assistant. If it's her part of the house, but you know of course I'm the president of the company. If I don't deal with this, and Ms. Lange can confirm that, you know I don't understand how am I answering this if I'm not the person that made these decisions.

> Q You delegated these decisions to Sheila Jackson --
>
> A And she made the mistakes.

occasions. RX 103, RX104, Tr 48-49. Knibb's Outdoor was a second subcontractor on the contract. Mr. Fields avers that he also told Knibbs verbally that there was a minimum wage determination. Id. After the 2000 investigation, "I told Tom [Knibb] that I would increase his prices to, to make sure that he was paying the correct wage." Id. 50. RX 109 and RX 110 commemorate that information. Again, it is alleged that the underpayments were paid immediately. Id. 51. However on cross examination, Mr. Fields admitted he never followed up to ensure payment had been made. Id. 109.

Mr. Fields testified that during the period of investigation, he performed every corporate management and administrative duty and was overworked. He did not have funds to hire anyone to help him perform those functions. Id. 54. It has fully cooperated in the DOL investigations and has never falsified records. He alleged that Respondent Company never committed a record keeping violation and has won awards for performance. Id. 54-55. It has 457 employees. Id. 57.

The company is operating under Chapter 11 Bankruptcy protection as a debtor in possession and if debarred, it is Mr. Field's opinion that the company will have to dissolve. Id. 56, 58- 59. He referred me to another company as an example of a company that failed under similar circumstances, also bearing the same name as Respondent Company. Id. 56-57, RX 115. He said that W/D had trouble with contracting because that company had been debarred. Ninety nine per cent (99%) of the company's work is under government contracts.

Although the Respondent alleges that he had no training in management and interpretation of SCA contracts, the record shows that Respondent Company displayed a DOL poster that describes duties under the SCA since 1998. CX 7, TR 64. Mr. Fields acknowledged that the poster advises that the wage determination may require fringe benefit payments and advises how to get further information about SCA compliance. Id. On redirect examination, Mr. Fields advised that he was not told exactly what to do and that the instructions on the poster were general. TR. 114-115.

The record also shows that he had meetings with DOL Wage and Hour investigator Kathy Rogers, in a Post-Award Conference, for the Janitorial Services Contract for the Wichita courthouse, in May 1999. TR. 62-64. Mr. Fields admits that the meeting took place but alleges that the information was not "detailed". TR 63. When asked why a correction was not done, Mr. Fields blamed Sheila Jackson:

> You know, at that time when we got the word from Peggy about the Wichita Contract she was telling us what information we needed to submit to get that done, that was in Sheila's ball court, I didn't know anything about it.

Id. 116. Mr. Fields acknowledged that he was provided a copy of the SCA, CX8.

At the conclusion of the Mail Haul Contract 2001 investigation, Mr. Fields and Ms. Rogers had a closing conference, when he agreed to comply with wage determinations on future contracts. Tr. 66, Stipulation 21. At the conclusion of a "second round" of investigations, the Janitorial Services Contract, Topeka Federal Building, Holloman Air Force Base, and 2001 U.S. Army Reserve, Mr. Fields had a closing conference on January 8, 2002 with WHI Rogers. TR. 66, RX 118a. Admittedly, Mr. Fields and his then attorney, Chris O'Brien, had an opportunity to Ask about contract compliance. TR. 67. Stipulation 22 states: "Mr. Fields agreed to comply in the future and to pay the back wages by March 31, 2001."

On April 23, 2002 , Mr. Fields attended another closing conference regarding the contracts that were investigated in 2002, and had an opportunity at that time to ask any questions that he might have had about SCA compliance. Id. Mr. Fields admitted that he was aware that there was no charge if he called to DOL ask questions about his accounts or he could seek help

on the DOL website. Id. 68.

He also admitted that although he knew he could petition to change his contracts, and although it was feasible to have done so, by at least April 23, 2001, he failed to change the Topeka Federal Building Contract and raise the employees base wages, he didn't do so under the Holloman Air Force Base Contract and raise the employees base wages, and the U.S. Army Reserve Contract and comply with the increased Wage Determination. Id 81-82.

Although Mr. Fields had alleged in writing, RX 118a, that the reason for the underpayment on the Janitorial Services Contract is that he did not understand the impact of the new Wage Determination, in reality, the failure to pay all the holidays doesn't have anything to do with the new Wage Determination, because the Wage Determination in question was attached to the original contract. TR 84.

And although Mr. Fields and Respondent Company had been cited in 2001 contract investigations in evidence, after the 2002 investigation he failed to review other contracts that were service contracts to make sure that he had complied with current Wage Determinations in those cases. Id. 99 101. The same finding was made in the 2003 U.S. Army Reserve Contract and the 2002 Holloman Base contract. Id 102. In the Grounds Maintenance contract the investigation was in 2003. Id. 109-111. The record shows that the violations were similar.

Respondent alleged that Respondent Company never committed a record keeping violation Id. 54-55. However, the record shows Mr. Fields was instructed on several occasions by Wage and Hour investigators to keep better records.

> Q And you hadn't, in fact, been keeping your records that way prior to Kathy Rogers investigation.
>
> A (Mr. Fields): Right.

Id. 111. He blamed it on Sheila Jackson. In fact, the company has engaged Mr. Sosa in response to record keeping problems. Id. 112.

Respondent Company alleged that it had always cooperated. DOL had to sue to release the funds on the Ground Maintenance contract. When confronted, Mr. Fields responded:

> No. It's a, I didn't know that there was a two-step process. I said, "Sue, take the funds out of my next contract payment." I didn't know that there was the two-step process. I told her what to do; she didn't do it.

Id. 112. "Sue" refers to Sue Stein, DOL contracting officer.

Mr. O'Brien testified that Respondent Company filed for bankruptcy in February, 2004. Id. 121. They filed a Chapter 11 bankruptcy proceeding, which is a reorganization process to file a plan of reorganization approved by the Court and by the creditors to repay the creditors of the bankrupt estate. There is no indication how long the procedure may last, depending on the outcome of the instant case. An unfavorable Decision and Order would have a negative affect in his opinion because the disclosure statement in bankruptcy would have a negative affect on the voting of the creditors to accept the plan because there would be concern as to whether or not the plan would be feasible, and under the Bankruptcy Code, Section 1129, one of the requirements to have a plan confirmed is the plan must be feasible. Id. 121-122. As a Debtor, Mr. Fields would have to either voluntarily convert his case from a Chapter 11 to a Chapter 7 liquidation, or the United States Trustees Office, who oversees the case would file a motion to have it converted. Id. 123.

Daniel Sosa, certified public accountant, testified that he was approved by the Bankruptcy Court, in summer, 2004, to bring the financial reporting up to date, and then also to make the accounting system acceptable to the federal government. Id. 130. He testified that he works with

SCA contracting companies. However on cross examination, he admitted he is not a specialist in SCA work. Id. 142. He had been the company's accountant, who did Respondent's tax returns for several years. Id.

Mr. Sosa described the Respondent Company as a Small Business Administration ("SBA") 8a Certified Firm, a business entity which has been certified by the Small Business Administration as an entity which has been able to demonstrate that it has had social and economic disadvantage. W/D had both a social and economic disadvantage because it is a minority owned business that had a lack of access to business capital. Id. 131-133.

Mr. Sosa charges $90.00 per hour for his services. W/D has done over sixteen million dollars ($16, 000,000.00) in government contracts since 1998. He testified that Respondent Company would not qualify as a SBA 8a company because of the volume in business and the number of employees.

Although Mr. Fields put together the SCA Compliance Policy, RX 116, Mr. Sosa contributed advice to Mr. Fields. As part of the bankruptcy proceedings, a plan of reorganization was also completed that shows how the company is going to be operating for the next several years. Id. 138-140.

Mr. Sosa also described a Kansas Minority Business Development Council award for outstanding achievement, and an award from the Kansas Department of Commerce, an award for outstanding achievement. He also described dealings with the Defense Contract Audit Agency, within the Department of Defense, whose mission is to ensure that contractors comply with certain federal acquisition regulations and various other policies and procedures. The Defense Contract Audit Agency performed a Pre-Audit Award "We worked very closely with DCAA Auditor Stephanie Casey to review the accounting system of W/D Enterprise, upon which she gave a rating of acceptable….. It means that in the eyes of the Defense Contract Audit Agency, Department of Defense, that W/D Enterprise's accounting system is acceptable in accumulating costs for billing under a government contract." Id. 137-140.

According to Mr. Sosa, debarment would cause immediate cessation of business activities. Id. 140. In his opinion, W/D Enterprise can not remain in the SBA Certified 8a Section if it is debarred. Id. 140 -141.

On cross examination, Mr. Sosa maintained that although the company was able to pay salaries for over 400 employees in 2001, it could not afford to have paid him $500 to do accounting work that year. Id. 142.. When asked whether it would have been feasible in 2001 to have performed SCA contract compliance audits in 2001, Mr. Sosa stated:

> During that period of time W/D Enterprise experienced, while you say that there was a sixteen million dollar gross revenue figure there was actually a net operating loss during that period of time of several hundred thousand dollars, so I doubt that that would have been possible.

Id. 143.

Although Mr. Sosa testified that he had been brought in to work on SCA contract compliance, he testified that in fact he hadn't done much work to date.

> Q And, you are not hired to review every W/D Enterprise service contract, correct?
> A No.
> Q In fact, you intend to review those contracts only on a selected sample basis, true?
> A That's correct.
> Q. And, in fact you only plan to review some of those contracts in the next few days because you happen to be in town today for this hearing, true?

A That's correct.

Id. 144-145.

Susan Lauritsen., who operated two small companies, Three Men and an Old Lady Lawn Service, and Lauritsen & Associates Property Management Company testified by deposition that she was told nothing about health and welfare payments and holiday pay by Mr. Fields at the time she entered into contract with Respondent in 2002.. Id. 159-160, 163-164. After directing my attention to CX 5, to show that Respondents failed to send Ms. Lauritsen copies of the SCA requirements, she asked Mr. Fields about missing pages:

Q: "Did you ask Darren Fields about what was in the missing pages?"

A: (Lauritsen) "Yes I did."

Q: "And what did he say?"

A: "That it didn't concern me."

Id. 163.

Thomas Knibb testified by deposition, CX 3, that Mr. Fields never discussed health and welfare pay or holiday pay with him. TR 165- 172. Both Mr. Knibb and Ms. Lauritsen testified that the first they were told of the obligation to provide health and welfare pay and holiday pay was from Sonia Granados, a representative of the Department of Labor. Id 164, 171. Respondent provided testimony from Mr. Knibb that the amounts in question were paid. Id. 174-175.

Susan Lang, Investigator with the U.S. Department of Labor, Wage and Hour Division, testified that she has been the investigator since 2003, and has reviewed files in this case. She alleged that because of the lack of clear records she was unable to determine whether or not wages should have been paid on the fringe benefit, were paid on the fringe benefit, or were paid on holiday hours for weeks under forty. CX 6. For example, in one case, the government hours are listed in one column but they are not split out between the 89th or the U.S. Courthouse, and "those records were never provided to me such that I could adequately identify whether or not the Employer actually paid the fringe benefit time on the hours worked." TR 188.[2]

She also alleged that 69.5 hours were spent in investigation. She testified that time was spent in a review of records, interviewing employees, conferences with Ms. Jackson regarding providing records necessary for review, as well as discussions of the violations and computational methods with her. Ms. Lang opined that if Respondent had followed the policy set out in RX 116, the SCA there still would have been violations specifically with respect to the increase in the Wage Determinations as modified into the contracts.

Mr. Fields Is a "Party Responsible" under the SCA

The term "party responsible," as used in the SCA, imposes individual and joint liability with the company for violations by corporate officers who actively direct and supervise performance of a covered contract, including the employment policies and practices of the business and the work of employees working on the contract. 29 C.F.R. § 4.187(e)(1). It further assigns personal liability for violations of any contract stipulation required by the Act on corporate officers who control, or are responsible for control of, the corporate entity based on their obligation to assure compliance with the requirements of the SCA, the regulations, and the contracts. 29 C.F.R. § 4.187(e)(2). "[C]orporate officers who control the day-to-day operations and management policy [of the corporation] are personally liable for underpayments because

[2] Relating to payment for Vielka Dickerson. "There were back wages which were able to be calculated due, however, because of the lack of clear records I was unable to determine whether or not wages should have been or were paid on the fringe benefit, fringe benefit wages were paid on holiday hours for weeks under forty." Id. 190.

they cause or permit violations of the Act." 29 C.F.R. § 4.187(e)(3). Personal liability for violations of the SCA is not limited to officers of the company or signatories to the contract, "but includes all person[s], irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including labor policy or employment conditions regarding the employees engaged in contract performance, and, who, by action or inaction, cause or permit a contract to be breached." 29 C.F.R. § 4.187(e)(4). As stated by the Administrative Review Board:

> Under the regulations it is clear that a corporate official who controls the day-to-day operations and management policy, or is responsible for the control of the corporate entity, or who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is liable for the violations individually and jointly with the company. 29 C.F.R. 4.187(e)(1), (2), (3).

In re ***Hugo Reforestation, Inc***., *supra,* quoting ***In re Nissi Corp***., SCA No. 1233, slip op. at 14 (Dep. Sec'y, Sept. 25, 1990).

A review of the stipulations and the evidence shows that Mr. Fields is the "party responsible" under the SCA. Especially see Stipulations 1-9 and TR 53 –54[3], TR 95.[4] I discount any allegation that he was not personally responsible for work assigned to corporate employees, such as Sheila Jackson. because he admitted that he is the corporate official who controlled the day-to-day operations and management policy, and was responsible for the control of the corporate entity, and actively directed and supervised the contract performance, including employment policies and practices and the work of the employees working on the contract

Discussion

"Unusual Circumstances"

I find that the Respondent has stipulated to violations of the Act and an independent review of the record shows that after the 2001 and 2002 investigations, Respondents continued to violate the SCA as they:

1. Failed to pay the minimum wages for each particular position listed in the Dictionary of Occupational Titles, a government compiled list of positions and the preliminary wages for the positions;
2. Failed to award minimum fringe benefits to employees;
3. Failed to maintain adequate records.

Because Respondents have violated the Act, they should be placed on the debarment list "[u]nless the Secretary otherwise recommends because of unusual circumstances." Section 5(a),

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[3] Q In 2001, 2002, and 2003 what positions were you personally, or what functions at W/D Enterprise were you personally performing?
A (Mr. Fields): Everything. The president, marketing, janitor, whatever needs to, needs to be done to make sure my contracts are operating properly.
Q Did you take out the trash if necessary?
A Whatever it took.
TR 53-54.

[4] Mr. Fields. A Correct. Now, Andrea [Luby], now, if I pointed that it's not my responsibility as far as implementing this, it was my assistant. If it's her part of the house, but you know of course I'm the president of the company. If I don't deal with this, and Ms. Lange can confirm that, you know I don't understand how am I answering this if I'm not the person that made these decisions.
Q You delegated these decisions to Sheila Jackson --
A And she made the mistakes.

4 U.S.C. § 354(a) (emphasis in original).[5] Therefore, Respondents bear the burden of proving unusual circumstances. [6] The parties stipulated that the Respondents bear the burden. "Burden of proof" as used in this setting and under the Administrative Procedure Act is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.[7] "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)4. The drafters of the APA used the term "burden of proof to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 114 S.Ct. 2251 (1994).

Under Part I of the test, the contractor must establish that the conduct giving rise to the SCA violations was neither willful, deliberate, nor of an aggravated nature, and that the violations were not the result of culpable conduct. Moreover, the contractor must demonstrate the absence of a history of similar violations, an absence of repeat violations of the SCA and, to the extent that the contractor has violated the SCA in the past, that such violation was not serious in nature.

The Respondents' agree that there were violations of the SCA, but argue that they were not willful, deliberate or of an aggravated nature, and did not constitute culpable neglect or culpable conduct. "A preponderance of the evidence supports the conclusion that "unusual circumstances" exist in this case that justify relieving Respondents from the sanction of debarment."[8] They want me to find that prior to its first government contract, neither Mr. Fields nor anyone else at W/D received any training on how to deal with contracts.[9] I accept that finding. They want me to also find that Respondent W/D is a SBA Section 8(a) Company that did not receive adequate training, and lacks capital and business resources to buy professional services and as a result, Mr. Fields had to perform tasks that normally would have been employed by professional employees.[10] It asks me to find that W/D's early history reveals it did not have the capital or business resources to hire individuals with the necessary expertise to ensure comprehensive compliance with the SCA. The record substantiates these allegations, and I so find.

However, the Department of Labor argues that even after Respondents were notified that serious SCA violations were found during the First and Second Investigations, "Despite these prior investigations, and numerous discussions with Wage and Hour investigators, Respondents continued to violate the Act for the three contracts investigated during the Third Investigation."[11]

I find that during the first contract investigations, the Respondents were deficient in wage and fringe benefit increases, and on the Janitorial Contract at Wichita, seventeen employees were not paid increases. Stipulation 27. Respondents have admitted violations under five separate contracts from those investigations, resulting in underpayments to its employees of $55,695.75.

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[5] Under the SCA, debarment is presumed once violations have been established unless the respondent can prove the existence of "unusual circumstances" that warrant relief from debarment. ***Hugo Reforestation, Inc.***, *supra*.

[6] Citing to ***In re: Andres Sharipoff, d/b/a BSR Co***., BSCA No. 88-SCA-32, 1991 WL 733683 (Sept. 20, 1991).

[7] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP [Sainz]***, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[8] See Respondents' proposed findings of fact.

[9] Respondents' Proposed Finding 8.

[10] See Respondents' Proposed findings 9-17.

[11] See Complainant's Proposed Conclusions of Law.

Moreover, one employee, Charlie Wilson was never paid. Stipulations 37 – 41. The record shows that by April 23, 2001, Mr. Fields became aware that he could request modification and testified that he instructed his assistant, Sheila Jackson, to seek an increase in reimbursement from GSA for complying with the revised Wage Determination for the Janitorial Services Contract. However, Respondents admit that Ms. Jackson failed to obtain this increase or to raise employees' wages. The record shows that Ms. Rogers had to make three requests before Respondents finally raised their employees' wages. Fields also falsely told WHI Rogers that the wages had been raised on September 1, 2001. I find that by the time Respondents finally came into compliance, employees had accrued $3,511.00 in additional back wages.

Subsequently, during the Second and Third investigations, I find that Mr. Fields knew or should have known that he continued to violate the SCA. I find that his assertion that all the subsequent errors were caused by mistakes, misunderstandings and confusion, which may have been true at first, was no longer credible. For example, I am cited to the 2003 US Army Reserve Contract. I am advised that Ms. Jackson "mistakenly believed" that vacation hours were not owed.[12] By the time this contract was investigated, Respondents were aware of the requirements of the SCA and its regulations through their frequent contact with other contracts. The failure to pay fringe benefits for vacations under this contract constituted a repeated violation. During the Second Investigation, Wage and Hour found the same violation had occurred under the Holloman Air Force Base Contract. However, Mr. Fields testified that Ms. Jackson misunderstood the findings of the Second Investigation, believing that she had been instructed not to pay fringe benefits on vacation hours. Department of Labor argues that Respondents had ample opportunity to discuss this investigative finding with Wage and Hour and to ask any questions they may have had at the end of the Second Investigation. "As federal contractors, Respondents had an 'affirmative obligation to ensure that [their] pay practices are in compliance with the SCA, and cannot [themselves] resolve questions which arise, but must seek advice from the Department of Labor.' 29 C.F.R. § 4.188(b)(4). It was Respondents' duty to ask questions until they understood the results of the Second Investigation. Respondents' professed ignorance of those findings does not excuse this repeated violation." I agree.

As another example, the record show that from October 2001 through April 1, 2002, Respondents paid Health and Welfare Benefits of $1.92 per hour, rather than the required $2.02 per hour. Id.. Most of these underpayments occurred after April 23, 2001. However, Respondents did not come into compliance with the revised Wage Determination until after Wage and Hour began its investigation in August 2001. TR. 81.

Although Mr. Fields testified repeatedly that he did not make errors "on purpose", it is obvious that he was negligent, to the point of disinterested as to compliance. For example, he took the following position:

> "You know, we just looked at this as the, us rolling into the next option year. The signing of the Wage Determination is just, we thought it was signing the original Wage Determination we always had and that we were still mandated to pay those mandatory base wages, holidays and everything." TR. 73.

Mr. Fields later claimed that he did not read the attached Wage Determination: "You know . . . I was so busy I didn't even look at that. I was just happy we were going into, rolling into the next option year, we were going to continue to provide services; we didn't even look at the Wage Determination. I'll be honest with you." TR. at 74.

[12] Respondent Proposed Finding 34-35.

I also note that Mr. Fields' assertions of Ms. Jackson's negligence after repeated violations do not negate his duty to conform to the contract. Generally, the principal is responsible for the acts of the agent or servant. Restatement (Second) of Agency § 219(1) (1957). Mr. Fields did not assert that Ms. Jackson intentionally failed to follow wage determinations. Therefore, her conduct is imputed to the Respondents as a matter of law.[13]

Additionally, "culpable conduct" includes "culpable neglect to ascertain whether practices are in violation, disregard of whether they were in violation or not." 4 C.F.R. § 4.188(b)(3)(i). "The regulations make clear that 'unusual circumstances' 'do not include those circumstances which commonly exist where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations." ***In re United Kleenist,*** *supra.* I find that by failing to properly supervise Ms Jackson, the Respondents committed culpable neglect.

I find further that Respondents continued to commit recordkeeping violations and continued to fail to repay Charlie Wilson after numerous requests to pay him. Even after Ms. Rogers' instructions, Respondents continued to violate the SCA's recordkeeping provisions. Wage and Hour Investigator Susan Lang's investigation of the 2003 U.S. Army Reserve Contract was impeded by recordkeeping violations, as Respondents failed to provide records that showed the number of hours worked by employees on each individual contract. [TR. 187-188]. Wage and Hour alleged a recordkeeping violation after that investigation. [TR. 195].

"Petty" or "Innocent"

Respondents also argue that the infractions are "petty" or "innocent" violations. Citing to ***United International Investigative Services, Inc***., ARB No. 95-40A, 92-SCA-31, 1997 WL 16492 (Jan. 10, 1997), at p. 4, they allege,

> At most, W/D's violations of the SCA can only be characterized as 'petty' violations. The overall total of underpayments from the 2001-2003 investigations represents only .4% of the approximate total gross revenue of W/D's government contracts, excluding expenses ($16,000,000.00). (Citing to Stipulation 10, 133 and 139; RX. 113 at ¶ 7, RX 118, RX 119 and RX 123 at p. 30 lines 1-4; and TR 134 lines 8-11.)

However, in ***United International***, the Administrative Review Board noted that the contractor exhibited an "unflagging and ultimately successful drive to rectify [its one] mistake." Respondents have committed numerous mistakes in this case, and moreover, in the Third Investigation, the record shows that Respondents failed to notify its subcontractors of the SCA's requirements to pay fringe benefits and holidays under the Grounds Maintenance Contract.[14] The record shows that Respondents failed to FAX the relevant wage determinations to the subcontractors.

I specifically reject the Respondents argument that Mr. Fields was ignorant of the law, as at a minimum, he was placed on notice of the law in Investigation Number 1, and he was admittedly negligent and failed to apprise himself of his contractual duties after April, 2001. For example, in the 2003 investigation, Respondents admitted that the Veteran's Administration's letter actually instructed him to pay for holidays:

> Q. And, the reason that they sent you that letter is that the contract provides that it's actually your responsibility to pay holidays to the employees, correct?
> A. Yeah, that's what they were saying. But we did that as a directive that they told us that they wouldn't pay the holiday pay so, if they're not paying us for it how can

[13] Moreover, if I accept that Ms. Jackson was in error, I must also find that Respondents were in error.

[14] See ***In the matter of Atec, Inc.***, BSCA No. SCA-1181, 1987 WL 383132 (July 21, 1987) (debarring general contractor who failed to ensure that subcontractor's employees were paid correctly).

we pay the employees; that's what our understanding was.

TR.103. When bidding on the contract, Respondents apparently overlooked the provision requiring the contractor, rather than the government, to bear the cost of holiday pay: "It just looked like a straightforward contract to us." TR 105. Rather than bearing the cost of its failure to carefully review the contract, Respondents decided not to pay holidays to their employees. This is evidence of a repeated violation.

Respondents request that I use a percentage of gross receipts method to consider whether the errors are "petty". It is true that the Respondents have millions of dollars in government contracts, but the proposed method of evaluation is not persuasive. In some cases a statistical sampling may be used to extrapolate to a large class of cases, but here I am asked to consider the reverse of that logic. I note that Wage and Hour investigated five contracts in 2001 and 2002, and concluded that a total of 86 employees of W/D Enterprise, Inc. had been underpaid a total of $55,695.75 in wages, welfare and fringe benefits and holidays. Stipulation 10. Subsequently in the Third Investigation, Respondents agreed to pay $9,885.36 for wages and fringe benefits under the contract on or before December 31, 2002, but failed to pay it for wages and fringe benefits under the "Gulf War" Hotline contract at the VA Medical Center in St. Louis, Missouri. Stipulations 97 and 98. Respondents admit that the $3,372.81 withheld by Wage and Hour should be distributed to the employees of Three Men and an Old Lady in the following amounts:

Lekeyth M. Gillard	$1,019.93
Nordric Tankins	$1,173.17
Jeffrey A. Williams	$1,179.71

Stipulation 118.

I find that these are substantial violations. ***In re: Crimson Enterprises, Inc. and Carl H. Weidner***, BSCA Case No. 92-08, 1992 WL 753884 (Sept. 29, 1992), the Board of Service Contract Appeals debarred a contractor found to have underpaid his employees by less than $3,000.00. "Having knowledge of the Act's wage requirements and failing to comply with these requirements is a clear demonstration of the type of culpable conduct described in the regulations which prevents a finding of unusual circumstances". This case is far more significant.

I find that compliance, even after prior investigations were not "unflagging and ultimately successful". ***United International,*** *supra.* Likewise, in ***Integrated Resource Management, Inc.,*** 1997-SCA-14 (ALJ Aug. 5, 1997), when notified that he was violating the SCA and CWHSSA, the contractor who was performing his first federal contract, immediately raised employees' pay rates, paid backwages as soon as he was notified, and sent all records to the DOL's investigator.[15] Again, in this case there have been three separate investigations. Even if the Respondents may have immediately corrected the problem at the first level, the Third Investigation began on November 30, 2002, and involved the U.S. Army Reserve Contract ("the 2003 U.S. Army Reserve Contract") and two additional contracts: Contract Number V255P(657)0374 ("the Gulf War Hotline Contract") [CX 15] and Contract Number DAKF29-02-P-0289 ("the Grounds Maintenance Contract") [CX 16]. The renewed contract incorporated Wage Determination 1994-2215 (Rev. 15). [Stipulation 81]. That investigation revealed that Respondents were not paying fringe benefits on vacation and holiday hours. [TR. 102; TR 183 (testimony of Ms. Lang)]. Fields again blamed this underpayment on his assistant, Ms. Jackson, as follows:

"There was a mistake. My office manager, Sheila Jackson didn't pay vacation pay,

[15] This case is not precedent. Recommended Decisions of a fellow administrative law judge may be persuasive but are not given deference.

> fringe, the fringe benefit amount on the vacation pay because she thought that she only paid that on hours worked, and that's what she thought she had heard from the previous investigator."

[Tr. at 43:25-44:4]. Actually, the previous investigator had found the same violation during the 2002 investigation of the Holloman Air Force Base Contract. [Tr. at 102 and 184-185].

In its Reply Brief, Respondent directs me to its Compliance Policy. I find that this is a *post hoc* reference, not relevant to show "unusual circumstances".

I note further, that under the Law, the term "unusual circumstances" is not defined in the Act. 29 CFR 4.188 sets forth:

> Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present. It is clear, however, that the effect of the 1972 Amendments is to limit the Secretary's discretion to relieve violators from the debarred list (H. Rept. 92-1251, 92d Cong., 2d Sess. 5; S. Rept. 92-1131, 92d Cong., 2d Sess. 3-4) and that the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction, ***Ventilation and Cleaning Engineers, Inc.,*** SCA-176, Administrative Law Judge, August 23, 1973, Assistant Secretary, May 22, 1974, Secretary, October 2, 1974. It is also clear that unusual circumstances do not include any circumstances which would have been insufficient to relieve a contractor from the ineligible list prior to the 1972 amendments, or those circumstances which commonly exist in cases where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract, failure to keep necessary records and the like. Emerald Maintenance Inc., Supplemental Decision of the ALJ, SCA-153, April 5, 1973.
>
> (2) The Subcommittee report following the oversight hearings conducted just prior to the 1972 amendments makes it plain that the limitation of the Secretary's discretion through the unusual circumstances language was designed in part to prevent the Secretary from relieving a contractor from the ineligible list provisions merely because the contractor paid what he was required by his contract to pay in the first place and promised to comply with the Act in the future.

Therefore, after a review of all of the evidence, I find that the Respondents failed to meet their burden to show "unusual circumstances." [16]

Any person or firm found to have violated the SCA shall be declared ineligible to receive Federal contracts for a period of three years unless the Secretary recommends otherwise because of "unusual circumstances." 41 U.S.C. § 354(a). In this case, the Department of Labor does not recommend otherwise.

[16] Complainant argues that rather than making a good faith effort to comply with the SCA, Mr. Fields appears to have systematically paid wage increases only when caught in violation by Wage and Hour. For all four contracts investigated during the Second Investigation, Fields failed to comply with revised wage determinations until after Wage and Hour advised him of underpayments. Although not alleged in the pleadings, Respondent's underpayments on the Portsmouth Naval Medical Center Contract demonstrate that Respondents had a practice of ignoring revised wage determinations. 29 C.F.R. § 18.406 (habit evidence). Fields ignored a revised wage determination incorporated into this contract on November 1, 2001 until Wage and Hour concluded its investigation of that contract in January 2003. By that time, employees were owed $7,858.00 in back wages. Although I admitted the evidence into the record, I give it little weight., as these investigations are not before me.

Therefore, I find that "unusual circumstances" or that violations were not willful, deliberate, or of an aggravated nature, and that the violations were not the result of culpable conduct, has not been proved by Respondents. 29 C.F.R. § 4.188(b)(3)(i). [Part I. of test.]

Alternative Findings

Because Respondents cannot show a lack of culpable conduct and has a history of SCA violations, I need not consider Parts II and III of the three part test. ***In re Hugo Reforestation, Inc. and Hugo Peregrino***, ARB Case No. 99-003, ALJ Case No. 97-SCA-20, 2001 WL 487727 at *11 (April 30, 2001). I will, however, consider those parts as well. All of the findings of fact and conclusions of law from the discussion of Part I *supra*, are incorporated here by reference.

Under Part II, the contractor must demonstrate a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance.

Department of Labor denies that Respondents promptly repaid employees the funds that Wage and Hour found to be due. After learning of SCA violations,

> Fields consistently waited until after he was investigated by Wage and Hour to reimburse the employees. This is not prompt payment as contemplated by the Secretary's regulations. In ***re: Crimson Enterprises***, BSCA Case No. 92-08 (Sept. 29, 1992) ("sums due the teenage employees were not paid promptly-- Crimson waited until DOL requested back wages following its investigation."). Even after being notified of underpayments by Wage and Hour, Respondents did not promptly correct all SCA violations. When the U.S. Courthouse contract was investigated, Mr. Fields agreed to pay Mr. Wilson by March 31, 2002, but failed to pay the employee by that date. [Stipulation Nos. 39-40]. Indeed, Respondents still owe Wilson $2,000.00, and appear not to have made a good faith effort to notify him that these funds are available. During the 2003 investigation of the Gulf War Hotline contract, W/D Enterprise, Inc. agreed to pay $9,885.36 for back wages and fringe benefits on or before December 31, 2002. [Stipulation No. 97]. By its own admission, the contractor failed to make any payments by that date. [Stipulation No. 98]. Only after being notified that the Wageand Hour Division had initiated cross-withholding on another government contract did the contractor pay the back wages that were due. [Stipulation No. 99]. Respondents also did not agree to repay its subcontractors' employees under the Grounds Maintenance Contract until after the Secretary filed this suit. Respondents' repayment history does not counsel against debarment.

The Department of Labor also asserts that Mr. Fields promised to comply with the SCA after the investigation of the Mail Haul Contract in 2001, then proceeded to violate the Act on six more contracts. Given Respondents' extensive history of SCA violations, Respondents would have to implement rigorous procedures to satisfy the Court that it would comply with its contractual obligations in the future.

They also allege that annual review of SCA contracts, which is at the heart of this compliance policy, does not ensure future compliance with the SCA. WHI Lang explained that "[w]hen a modification is provided to a contractor, it has a specific effective date for that modification [such as] a Wage Determination to be incorporated into that contract with a specific contract date." [Tr. at 192]. By reviewing these modifications only annually, Respondents virtually guarantee that they will fail to implement wage increases in a timely manner. Rather than reading its contracts and wage determinations only once per year, Respondents should have adopted a policy of reading each contract, and attached wage determination, before it took effect. This is the only way to ensure that employees receive their raises when they are due.

I accept these arguments and find that Part II has not been proved. Respondents failed to establish that W/D has a good compliance history, cooperated in the investigation, repaid the moneys due, and has made sufficient assurances of future compliance. 29 C.F.R. § 4.188(b)(3)(ii).

Other Issues Raised by Respondents

Although I have determined that the Respondents failed to establish entitlement under part I or Part II, in a abundance of caution, I consider Part III. All of the findings of fact and conclusions of law from the discussion of Parts I and II *supra*, are incorporated here by reference. Under Part III, there are a number of other factors that must be considered including, whether the contractor has previously been investigated for violations of the SCA, whether the contractor has committed recordkeeping violations which impeded the Department's investigation, and whether the determination of liability under the Act was dependent upon the resolution of bona fide legal issues of doubtful certainty.

Respondents argue that the adverse economic impact debarment would have on their more than 450 employees, precludes a finding against them. Respondents argue that their debarment would result in immediate layoffs of all of their employees. Department of Labor argues, conversely, that it is precisely to protect these workers, and others that Respondents might hire in the future, that Respondents must be debarred. In passing the SCA, Congress recognized that employees of government service contractors "tended to be among the lowest paid people in the country, and they tended not to be organized by trade unions." House Comm. on Educ. & Labor, Special Subcomm. On Labor, Hearing on H.R. 6244 and H.R. 6245, 92nd Cong. 3 (1971) (Statement of Rep. James G. O'Hara). "Because of the important interests at stake, Congress found that simply requiring violating contractors 'to pay what they should have been paying to begin with,' inadequately deterred and punished such employers." ***Summitt Investig. Serv., Inc. v. Herman***, 34 F.Supp.2d 16, 19-20 (D.D.C. 1998), quoting Statement of Rep. James G. O'Hara. To protect these employees, Congress drafted the 1972 amendments to the Service Contract Act to ensure that debarment would be "virtually automatic" and "expeditiously and rigorously applied" when contractors violated the statute. House Special Subcomm. On Labor, Comm. on Educ. & Labor, The Plight of the Service Workers Under Government Contracts, 12-13 (Comm. Print 1971).

Respondents argue that layoffs will result from the debarment of W/D Enterprise, and that the layoffs will impose a hardship on Respondents' employees. However, the debarment to be imposed would prohibit the award of future government contracts to Respondents. Respondents have no way of knowing whether they would be awarded future contracts in the absence of debarment, so this argument has little merit. Besides, on at least one of the contracts at issue in this case, Respondents left the hiring of the labor to perform the work to subcontractors. Mr. O'Brien testified that the Company will go from Chapter 11 Bankruptcy status to liquidation status under Chapter 7.

I accept the Complainant's argument that Respondents' financial circumstances do not warrant relief from debarment. Respondents rely on an Administrative Review Board case involving much different facts, ***United International Investigative Services, Inc***., *supra*., where the Administrative Review Board noted that the contractor exhibited an "unflagging and ultimately successful drive to rectify [its one] mistake." Respondents' efforts to assure future compliance in this case are less impressive. In ***United International***, the Court found that the contractor's violation was not culpable or willful. By contrast, this case involves several culpable

or willful violations. In light of its numerous culpable violations of the SCA, Department of Labor cites to cases that require debarment despite status as an SBA certified Section 8(a) contractor. ***Vigilantes, Inc. v. Administrator of Wage and Hour***, 968 F.2d 1412 (1st Cir. 1992); ***Summitt Investig. Serv., Inc. v. Herman***, 34 F.Supp.2d 16 (D.D.C. 1998) (debarring Section 8(a) contractor for culpable neglect). Vigilantes, Inc. was an SBA certified Section 8(a) contractor with "hundreds of employees" and ten government contracts. Id. at 1418. The company was investigated in 1978 and warned that failure to comply with the SCA could result in debarment. Id. When the company continued to violate the SCA, the Court found "a pattern of culpable neglect." Id. The U.S. Court of Appeals for the First Circuit therefore affirmed the Administrative Review Board's decision to debar the company. Id. The same pattern of culpable neglect exists in this case.

Respondents further allege that they received insufficient training from the SBA regarding how to comply with the SCA. However, Respondents had ample opportunity to learn about the SCA's requirements from Wage and Hour. The parties stipulated that Fields met with WHI Rogers in May 1999, when WHI Rogers "explained all of the provisions of the SCA" and even provided Fields with copies of the SCA, Part 4 of the SCA Regulations at 29 C.F.R. Section 4, a poster, and non-tech bulletins on SCA compliance. [Stipulations 23-25]. WHI Rogers again discussed the provisions of the SCA with Fields at the conclusion of the First Investigation in March 2001, and told Fields that he had to comply with the revised wage determination. [Stipulation 21]. Fields admittedly knew how to contact Wage and Hour with any questions about the SCA. Fields actually understood his duty to comply with revised wage determinations on April 23, 2001, yet persisted in underpaying his employees. Lack of capital and training does not explain Respondents' many culpable violations of the SCA that were found during Wage and Hour's Second and Third Investigations.

Moreover, the Department of Labor maintains that Respondents cannot persuasively argue that their economically disadvantaged status precluded them from hiring an accountant to assist them with SCA compliance until recently. Sosa intends to charge Respondents only $500.00 for his SCA services this year. They argue that a business that has obtained more than $16 million in revenues from government contracts since 1998 surely could have borne this expense before the SCA violations occurred.

After a review of all of the evidence, even if I had accepted the Respondents arguments in Parts I and II, I accept the argument of the Department of Labor and find that there is no basis to apply equity in Part III.

ORDER

It is hereby **ORDERED**:

1. Darren Fields and W/D Enterprise, Inc. violated the Service Contract Act;
2. Mr. Fields and W/D Enterprise, Inc. did not meet their burden of proving the existence of "unusual circumstances" which would relieve them from debarment;
3. The 89th Regional Support Command in Wichita, Kansas shall release the $3,372.81, which it has withheld from contracts of W/D Enterprise, Inc., to the United States Department of Labor, Wage and Hour Division for payment to employees of Three Men and an Old Lady;
4. Darren Fields and W/D Enterprise, Inc. shall not be awarded contracts by the United States Government for three years.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board ("ARB") within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). See 29 C.F.R. § 6.20. The Board's address is:

Administrative Review Board
United States Department of Labor
Room S-4309
200 Constitution Avenue, NW
Washington, DC 20210

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

The ARB's Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b). Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).